

**ARIZONA COURT OF APPEALS
DIVISION TWO**

NAIMA SIMI,

Petitioner/Appellee,

vs.

STEPHEN SIMI,

Respondent/Appellant.

**Court of Appeals No.
2 CA-CV 2010-0009**

**Pima County Superior
Court No. D2001-0792**

OPENING BRIEF

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STATEMENT OF THE CASE & RELEVANT FACTS

¶1 The parties were divorced in late 2001. (IR # 81) Since that date, the parties have engaged in protracted custodial litigation, culminating in the instant matter before this Court, where each party requested that the trial court award them sole legal custody of the children. (IR # 312, 319)

¶2 After trial, the trial court entered its Order regarding custody and parenting time. (IR # 349) That Order did not contain the findings of fact and conclusions of law mandated by both A.R.S. § 25-403(B) and A.R.S. § 25-403.01(B).

¶3 Appellant filed a Motion for Reconsideration, asking the court to make specific findings as required by statute. (IR # 358) The trial court did not, stating that the required specific findings were implicit in its Order. (IR # 370)

¶4 Appellant timely filed his appeal. Jurisdiction is proper in this Court pursuant to A.R.S. § 12-120.22(A).

STATEMENT OF ISSUES

ISSUE PRESENTED: In a contested custody matter, must a trial court make specific written findings on the record regarding at least the statutory factors contained in A.R.S. § 25-403(A)?

ANSWER: Clearly so.

ARGUMENT

I. STANDARD OF REVIEW.

¶6 The trial court's decision regarding matters of child custody are reviewed for abuse of discretion. *Ward v. Ward*, 88 Ariz. 130, 353 P.2d 895 (1960).

II. INTRODUCTION.

¶7 Arizona law mandates that a trial court must make specific findings regarding the best interests of the children in a contested custody case. The trial court did not. This case must be remanded.

A. A.R.S. § 25-403(B).

A.R.S. § 25-403(B) mandates that:

In a contested custody case, the court shall make specific findings on the record about all relevant factors and the reasons for which the decision is in the best interests of the children.

Id. In both its initial Order and its ruling on Appellant's Motion for Reconsideration, the trial court did neither. In its Order, the trial court made no mention of the best interests of the children, nor any of the statutory factors of A.R.S. § 25-403(A). (*See* IR # 349) In its ruling regarding Appellant's Motion for Reconsideration, the trial court simply listed the factors found in A.R.S. § 25-403(A) and stated that its prior Order was consistent with those factors.

¶8 This case presents exactly the same factual situation as confronted Division One in *Reid v. Reid*, 222 Ariz. 204, 213 P.3d 353 (App. 2009). In that case the trial court listed the statutory factors of A.R.S. § 25-403(A) and stated that it had considered them. *Reid*, 222 Ariz. at 356 ¶ 13.

¶9 The Court found that inadequate to meet the mandate of § 25-403(A) as a matter of law because the failure to do so removed the baseline required by “all parties and the family court in determining the best interests of the child or children, both currently and in the future.” *Id.* at 358 ¶ 18. This holding is, of course, consistent with a long line of Arizona law. *See, inter alia, Clifford v. Woodford*, 83 Ariz. 257, 262, 320 P.2d 452, 455 (1957) (stating that the child's best interest is the “primary consideration” and the “pole star” for the court). The court held that the failure to make those findings was a clear abuse of discretion requiring remand. *Reid*, 222 Ariz. at 358 ¶ 20.

¶10 Pursuant to the terms of A.R.S. § 25-403(B), the failure of the trial court to make neither specific findings regarding the statutory factors of A.R.S. § 25-403(A), nor a finding that its decision was in the best interest of the minor children, is a clear abuse of discretion. This case must be remanded.

B. A.R.S. § 25-403.01(B)

¶11 A.R.S. § 25-403.01(B), in relevant part, mandates that:

The court may issue an order for joint legal custody over the objection of one of the parents if the court makes specific written findings of why the order is in the child's best interests. In determining whether joint custody is in the child's best interests, the court shall consider the factors prescribed in § 25-403, subsection A...

Id. Again, the trial court made no specific written findings of why its Order was in the children's best interest. Nor, but for passing reference in its subsequent ruling, did it make any specific written findings pursuant to § 25-403(A). Clearly, again, the trial court abused its discretion in this matter. Remand is the appropriate remedy.

III. CONCLUSION.

¶12 The trial court did not make the findings mandated by either § 25-403(B) or § 25-403.01(B). Both failures are a clear abuse of discretion. This matter must be remanded.

RESPECTFULLY SUBMITTED this 24th day of February, 2010.

KHALIDI & FERRIER, P.L.L.C.

//s Robert M. Ferrier

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CERTIFICATE OF COMPLIANCE

Pursuant to ARCAP 14(b), I certify that the attached brief:

- X Uses proportionately spaced type of 14 points or more, is double spaced using a Roman font, and contains 576 words; OR
- Uses monospaced type of no more than 10.5 characters per inch;
AND
- Does not exceed 14,000 words or 50 pages [**if Opening or Answering Brief**]
- Does not exceed 28,000 words or 100 pages [**if combined Answering Brief and Opening Brief on Cross-Appeal**]
- Does not exceed 21,000 words or 75 pages [**if combined Reply Brief and Answering Brief on Cross-Appeal**]
- Does not exceed 7,000 words or 25 pages [**if Reply Brief or Reply Brief on Cross-Appeal**]

Date: February 24, 2010

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CERTIFICATE OF SERVICE

I certify that on the 24th day of February, 2010, I served the above Brief on all counsel of record by depositing a TWO true copies thereof in the United States mail addressed as follows:

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